

REMARKS/ARGUMENTS

Claims 21 and 23 are pending.

Favorable reconsideration is respectfully requested in view of the following remarks.

REJECTION UNDER 35 U.S.C. § 102:

The Examiner rejected claims 21 and 23 under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent Publication No. 2002/0183738 (Chee et al). This rejection is traversed for the reasons that follow.

Chee published on December 5, 2002. However, the Chee patent claims priority back to several provisional applications, going back to a first provisional application (U.S. Ser. No. 60/137,265) filed on June 2, 1999. June 2, 1999 is prior to the priority date of the present invention (August 5, 1999). However, the Chee patent is not entitled to a priority date of June 2, 1999, and, therefore 35 U.S.C. § 102(e) does not apply.

In the Chee patent, the chain of events was as follows: An initial provisional application was filed on June 2, 1999. One year later, on June 2, 2000, a PCT application (PCT/US00/15386, WO 00/72908) was filed that claimed priority to the provisional application filed on June 2, 1999. The owners of the PCT application were required to have filed a U.S. Utility application based on the PCT application by thirty months from the provisional filing date, or by December 2, 2001. The utility application based on the PCT application was not filed until March 14, 2002. The owners of the PCT application may have been able to correct this by the filing of a petition in March of 2002. However, a check of the file history of the Chee application (U.S. Publication No. 2002/0183738) cited in the present

case shows that no such petition was filed or granted. As stated in the MPEP at Section

201.11(a):

A petition under 37 CFR 1.78(a)(3) for accepting an unintentionally delayed benefit claim and the surcharge under 37 CFR 1.17(t) are required to add a benefit claim under 35 U.S.C. 120 >and 365(c)< in an abandoned international application >designating the United States< filed on or after November 29, 2000, even when the international application did not enter the national stage under 35 U.S.C. 371. For example, when filing a "bypass" continuation application under 35 U.S.C. 111(a) that claims the benefit of an international application >designating the United States< with a filing date on or after November 29, 2000 that could have but did not claim the benefit of an earlier U.S. application, and the benefit claim is to be added to the international application, a petition under 37 CFR 1.78(a)(3) must be filed in the international application.

No such petition, nor its requisite fee, was filed.

As a matter of law, the Chee patent is not valid as prior art usable against the present application. The earliest priority date that the Chee patent is entitled to and the relevant date for analysis under 35 U.S.C. § 102(e) is the filing date of the PCT application, June 2, 2000. This date is well after the priority date of the present application of August 5, 1999. The Chee patent may therefore not be used as prior art citable against the present application.

It is therefore asserted that claim 21 is in condition for allowance. It is respectfully requested that the Examiner pass claim 21 to allowance. Claim 23 depends from independent claim 21 and therefore should also be allowable.

For at least the reasons set forth above, it is respectfully submitted that the above-identified application is in condition for allowance and claims 21 and 23 are allowable. Favorable reconsideration and prompt allowance of the claims are respectfully requested.

Application No. 10/763,558
Amendment Dated August 27, 2007
Reply to Office Action of June 5, 2007

Should the Examiner believe that anything further is desirable in order to place the application in even better condition for allowance, the Examiner is invited to contact Applicants' undersigned attorney at the telephone number listed below.

Respectfully submitted,

CAESAR, RIVISE, BERNSTEIN,
COHEN & POKOTILOW, LTD.

August 27, 2007

By: 

Gary A. Greene
Registration No. 38,897
Customer No. 03000
215) 567-2010
Attorneys for Applicants

Please charge or credit our Account
No. 03-0075 as necessary to effect
entry and/or ensure consideration of
this submission.